

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 30532

Appellee

v.

ELLIOTT C. GALES

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 17 10 3553

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 9, 2023

HENSAL, Presiding Judge.

{¶1} Elliott Gales appeals the sentences imposed by the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} In 2019, a jury found Mr. Gales guilty of trafficking in cocaine, possession of cocaine with a criminal forfeiture specification, having a weapon under a disability, and possessing a defaced firearm. The trial court merged the trafficking and possession convictions (counts one and two) and sentenced him to six years in prison for trafficking in cocaine. The trial court also sentenced Mr. Gales to prison for three years for having a weapon under disability (count five) and to 180 days in jail for the remaining conviction, which was a misdemeanor (count six). The trial court ordered the sentences for count one and count five to be served consecutively but concurrently with the sentence for count six.

{¶3} Mr. Gales appealed, arguing, in part, that the trial court did not make the findings required to impose consecutive sentences on the record and that the record did not support consecutive sentences. This Court agreed that the trial court did not make findings on the record, sustained that assignment of error, and remanded the matter for resentencing “so that the trial court ‘can properly consider R.C. 2929.14(C)(4) and make the necessary findings.’” *State v. Gales*, 9th Dist. Summit No. 29316, 2022-Ohio-776, ¶ 40, quoting *State v. Callaghan*, 9th Dist. Summit No. 29431, 2021-Ohio-1047, ¶ 25. We concluded that his assignment of error challenging the evidence supporting consecutive sentences was moot. *Id.* at ¶ 41. At his resentencing hearing, Mr. Gales urged the trial court to impose a different sentence, but the trial court declined to do so. Mr. Gales appealed, assigning seven errors for this Court’s review. His assignments of error are rearranged for ease of disposition.

II.

ASSIGNMENT OF ERROR II

A TRIAL COURT ABUSES ITS DISCRETION WHEN IT FAILS TO CONSIDER EXAMPLES OF THE OFFENDER’S REHABILITATION, INCLUDING ANY SUBSEQUENT GROWTH OR INCREASE IN MATURITY DURING CONFINEMENT.

{¶4} In his second assignment of error, Mr. Gales argues that the trial court erred by refusing to reduce the sentences it imposed as a result of his resentencing hearing. This Court does not agree.

{¶5} “[O]n a direct appeal of a criminal conviction, any aspect of a defendant’s sentence may be challenged and any part of that sentence that has been successfully challenged may be corrected.” *State v. Christian*, 159 Ohio St.3d 510, 2020-Ohio-828, ¶ 16. *See also State v. Pustelniak*, 9th Dist. Lorain No. 19CA011575, 2020-Ohio-3534, ¶ 13. A trial court can resentence a defendant de novo with respect to any counts for which the original sentence was vacated in a

direct appeal. *Christian* at ¶ 29. Errors that require resentencing require the trial court “to proceed on remand from the point at which the error occurred.” *State v. Goff*, 154 Ohio St.3d 218, 2018-Ohio-3763, ¶ 20, quoting *State v. Chinn*, 85 Ohio St.3d 548, 565 (1999). When this Court concludes that a trial court erred in making the findings required to impose consecutive sentences, however, the scope of the remand is limited to that issue. See *State v. Tolbert*, 8th Dist. Cuyahoga No. 111716, 2023-Ohio-532, ¶ 9-10; *State v. Stubbs*, 6th Dist. Sandusky No. S-19-048, 2020-Ohio-4536, ¶ 18; *State v. Rock*, 11th Dist. Lake No. 2018-L-107, 2019-Ohio-2507, ¶ 12. “The [trial] court [is] not required, nor would it be permitted, to address any other aspect of [the defendant’s] sentence.” *Tolbert* at ¶ 11.

{¶6} In Mr. Gales’ first appeal, this Court concluded that the trial court erred by failing to make the findings required to impose consecutive sentences. The scope of this Court’s remand, therefore, was limited to that issue, and the trial court was neither required nor permitted to revisit the sentences for individual offenses. Mr. Gales’ second assignment of error is overruled for this reason.

ASSIGNMENT OF ERROR I

COUNSEL IS INEFFECTIVE AFTER REMAND WHEN HE FAILS TO AFFORD DEFENDANT ALL PROCEDURAL DUE PROCESS RIGHTS MADE AVAILABLE WHEN DEFENDANT[’S] SENTENCE IS VACATED AND DEFENDANT IS IN THE SAME POSITION AS IF THERE WERE NO SENTENCE IMPOSED.

{¶7} Mr. Gales’ first assignment of error appears to argue that trial counsel was ineffective in connection with representing him at trial and by failing to advocate more strongly for a different sentence at his resentencing hearing. Mr. Gales raised ineffective assistance of counsel in his first appeal, and this Court overruled his assignment of error. *Gales* at ¶ 15-20. To

the extent that Mr. Gales raises issues related to trial again in this appeal, his arguments are barred by res judicata. *See State v. D'Ambrosio*, 73 Ohio St.3d 141, 143 (1995).

{¶8} With respect to his arguments in connection with his resentencing, a defendant must demonstrate that counsel's performance was deficient in order to establish ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As explained above, the scope of Mr. Gales' resentencing was limited to the imposition of consecutive sentences, so counsel's decision not to advocate for a different sentence is not evidence of deficient performance. Mr. Gales' first assignment of error is, therefore, overruled.

ASSIGNMENT OF ERROR VII

COUNSEL AND A TRIAL COURT[’S] FAILURE TO COMPLY WITH A LEGAL RULE IS STRUCTURAL ERROR WHICH CAN BE REVIEWED UNDER PLAIN ERROR CRIM.R. 52(B) REQUIRING REVERSAL.

{¶9} In his seventh assignment of error, Mr. Gales argues that the trial court erred during trial by permitting him to proceed pro se without knowingly and voluntarily waiving the right to counsel. Mr. Gales could have assigned this error in his first appeal, so this argument is barred by res judicata. *See D'Ambrosio* at 143. Mr. Gales' seventh assignment of error is overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED CONSECUTIVE SENTENCES WITHOUT MAKING ANY OF THE REQUIRED AND NECESSARY FINDINGS UNDER R.C. 2929.14(C)(4)(A)(B)(C).

ASSIGNMENT OF ERROR V

THE TRIAL COURT FAILED TO MAKE THE REQUIRED FINDINGS FOR CONSECUTIVE SENTENCES UNDER R.C. 2929.14(C)(4), (A), (B), (C).

{¶10} In his fourth and fifth assignments of error, Mr. Gales argues that the trial court failed to make the findings necessary to impose consecutive sentences. This Court does not agree.

{¶11} “When a person is sentenced for having committed multiple offenses, the presumption is that those sentences will be imposed concurrently, not consecutively.” *State v. Gwynne*, __ Ohio St.3d __, 2022-Ohio-4607, ¶ 10, citing R.C. 2929.41(A). Section 2929.14(C)(4) requires trial courts to make certain findings before imposing consecutive sentences:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

* * *

(c) The offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

See also Gwynne at ¶ 10. These findings must not be made in the abstract but with a consideration of the aggregate prison term that will result from a consecutive sentence. *Id.* at ¶ 14-17. This Court’s review of consecutive sentences involves two stages: In the first, we consider whether the trial court made the findings required by Section 2929.14(C)(4). *Gwynne* at ¶ 25-26. In the second, we determine whether the record clearly and convincingly supports the findings. *Id.* Mr. Gales has not argued that the trial court made findings that were unsupported by the record, so this Court’s review is limited to whether the trial court made the required findings.

{¶12} “[A] trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry[.]” *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, syllabus. A trial court is not, however, required to explain its findings before imposing consecutive sentences. *Id.* “[T]he record must contain a basis upon which a reviewing court can determine that the trial court made the findings required by R.C. 2929.14(C)(4) before it imposed consecutive sentences[.]” but “a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial

court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.” *Bonnell* at ¶ 28-29.

{¶13} During the resentencing hearing, the trial court found, in language consistent with Section 2929.14(C)(4)(c):

[C]onsecutive sentencing is necessary in order to protect the public, punish the offender, and is also not disproportionate to the offenses, including significant trafficking in drugs as well as carrying a firearm when an individual is under a disability for such firearm. And it is also due to multiple offenses and the concern for future criminal activity by the offender.

The trial court’s findings under Section 2929.14(C)(4) and (C)(4)(c) were reiterated in the sentencing entry, which also included findings under Section 2929.14(C)(4)(b) that the trial court did not make during the resentencing hearing. Because a trial court is only required to make findings under Section 2929.14(C)(4)(a), (b), *or* (c), however, the omission of those additional findings from the resentencing hearing did not prevent the trial court from imposing consecutive sentences. The trial court was not required to further explain its findings before imposing consecutive sentences. *Bonnell* at syllabus. Mr. Gales’ fourth and fifth assignments of error are, therefore, overruled.

ASSIGNMENT OF ERROR VI

A TRIAL COURT HAS A DUTY TO IMPOSE SENTENCE IN ACCORDANCE WITH THE AMENDED STATUTES IF THE PUNISHMENT HAS NOT ALREADY BEEN IMPOSED.

{¶14} Mr. Gales’ sixth assignment of error is that the trial court erred by notifying him of his postrelease control obligations under the version of Section 2967.28(B)(2) that was in effect when he was originally sentenced. This Court does not agree.

{¶15} Under Section 1.58(B), “if a statutory amendment reduces the punishment for an offense, the ‘punishment, *if not already imposed*, shall be imposed according to the statute as

amended.’” (Emphasis added.) *State v. Thomas*, 148 Ohio St.3d 248, 2016-Ohio-5567, ¶ 8, quoting R.C. 1.58(B). During his resentencing hearing and in the corresponding sentencing entry, the trial court informed Mr. Gales that he was subject to five years of postrelease control. Mr. Gales argues that instead, he should be given the benefit of changes to Section 2967.28(B)(2) that took effect while his appeal was pending. Assuming that Section 1.58(B) applies to postrelease control, however, this Court’s previous decision did not vacate the sentences that the trial court imposed. *See State v. Cochran*, 10th Dist. Franklin No. 14AP-447, 2015-Ohio-1102, ¶ 12. Instead, the matter before the trial court was limited to the consideration of consecutive sentences. *See Rock*, 2019-Ohio-2507, at ¶ 12. Under these circumstances, the trial court was not required to apply the amendments to Section 2967.28(B)(2) when he was resentenced. *Compare State v. Morgan*, 2d Dist. Montgomery No. 27774, 2018-Ohio-3198, ¶ 23 fn.2. Mr. Gales’ sixth assignment of error is, therefore, overruled.

ASSIGNMENT OF ERROR III

ONCE THE TRIAL COURT FINDS THAT THE OFFENDER HAS BEEN
CONVICTED OF ALLIED OFFENSES IT IS ERROR TO IMPOSE SENTENCE
ON EACH COUNT.

{¶16} In his third assignment of error, Mr. Gales argues that the trial court erred by merging count one and count two but imposing concurrent sentences on both counts. The State acknowledges that the trial court stated that a concurrent sentence would be imposed for count two when the trial court announced the sentence and concedes error on this basis. This Court, however, concludes that the trial court did not ultimately sentence Mr. Gales for count two.

{¶17} Because a court speaks through its journal, a trial court may revise a sentence after it is announced but before it is journalized for any lawful reason. *State v. Bryant*, 168 Ohio St.3d 250, 2022-Ohio-1878, ¶ 23. Consequently, this Court has concluded that when a trial court

incorrectly imposes concurrent sentences for merged offenses on the record but corrects that error in the sentencing entry, that entry reflects the ultimate sentence that is imposed. *State v. Mercer*, 9th Dist. Summit No. 26361, 2013-Ohio-1527, ¶ 30. In this case, as the State acknowledges, the trial court incorrectly imposed concurrent sentences on count one and count two. The trial court's sentencing entry and the subsequent nunc pro tunc entry, however, both stated that the trial court merged count two into count one for sentencing and sentenced Mr. Gales to six years in prison for count one. There is therefore no error apparent on the record, and Mr. Gales' third assignment of error is overruled.

III.

{¶18} Mr. Gales' seven assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to

mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JENNIFER HENSAL
FOR THE COURT

CARR, J.
FLAGG LANZINGER, J.
CONCUR.

APPEARANCES:

ELLIOTT GALES, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and JACQUENETTE S. CORGAN, Assistant Prosecuting Attorney, for Appellee.